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Supreme Court, U.S.
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No. 94-1147

In The

# Supreme Court of the United States

October Term, 1994

VIDEO VISIONS, INC.; VIDEO STUDIO, INC.; FACIT PROPERTIES, INC.,

*Petitioners,*

vs.

STATE OF OHIO, EX REL. ROBERT L. KONSTAM,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Ohio Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

I. Is a state statute which requires the closure of premises where a nuisance is found to exist and forfeiture of personal property used in the nuisance, unconstitutional as applied under the First and Fourteenth Amendments when the statute is used by a municipality to padlock a video arcade situated in a bookstore when it was proven by clear and convincing evidence that masturbation was occurring in the video arcade and the bookstore was not closed and the video viewing was allowed to relocate to an area of the store in view of the sales counter?

II. Where it is alleged that an action under such a nuisance statute is being prosecuted by a municipality as a pretext for closing a bookstore and video arcade because of the sexually explicit but constitutionally protected expression offered there, do the First and Fourteenth Amendments require that such a demonstration of pretext be recognized as a complete affirmative defense to the action or rather is it more properly characterized as an element of selective prosecution as indicated in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)?

III. In such a case, do the First and Fourteenth Amendments, at a minimum, require that the remedy ordered to abate the nuisance be less restrictive than closing the booths situated in the back of the bookstore where it was found that masturbation was taking place and forfeiture of the personalty in the arcade in order to comply with *United States v. O'Brien*, 391 U.S. 367 (1968)?

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## RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent Robert L. Konstam respectfully requests that the Court deny the Petition for a Writ of Certiorari submitted by the Petitioners.

## OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioners' identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

## STATEMENT OF THE CASE

A complaint was filed by Realtor, Robert L. Konstam, Law Director of the City of Mansfield, Ohio, alleging Video Visions, et al. to be maintaining a nuisance and seeking abatement, injunctive relief, forfeiture, and a tax, all as provided for in Chapter 3767 of the Ohio Revised Code (hereinafter O.R.C.).

Video Visions, et al. were found to be maintaining a nuisance within the meaning of O.R.C. § 3767.01(c), a place where lewdness is conducted. As a matter of fact the court found by clear and convincing evidence respondents had knowledge of and acquiesced in the use of the video booths for a fee for masturbation purposes because the booths were designed to facilitate such use by virtue of their remote placement in the video arcade, their lack of visibility to store employees and the existence of a warning bell warning occupants of the booth area of an arrival.

The trial court found a person who came to watch a movie would have to invest $22.50 in order to view one hour of a film. Officers visited the arcade every day during one four-day period from October 26 through October 29, 1992. On each day, they saw obvious evidence of the use of the booths for masturbation. On October 27, 1992 officers collected samples from 8 of the 22 booths, and 7 of the samples were confirmed to be, or to contain semen. They also found a used condom in one booth. Officers observations included puddles of what appeared to be semen on the floor and soiled kleenexes and paper

towels. The trial court found that respondents had to know that the booths were used for masturbation purposes unless they were determined not to know. (Petitioners' Appendix [hereinafter "App."] at A47-A50).

Since masturbation in public is unlawful sexual conduct not entitled to First Amendment protection, the trial court proceeded to abate the nuisance.

It is important to note that the trial court's permanent injunction and order abating the nuisance did not close the bookstore and it even allowed them to relocate a video booth to an open area of the store within clear view of the sales counter. (App. A41).

Petitioners appealed the trial court's judgment to the Court of Appeals for Richland County, Ohio, Fifth Appellate District, which affirmed the trial court in all respects, except concerning the charging of customers for use of the relocated video booth and the judgment against individually named defendants. (App. A28). Petitioners further appealed to the Ohio Supreme Court which dismissed their appeal for want of a substantial constitutional question. (App. A1).

## SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari should be denied because Petitioners have not established any basis for review by this court.

Masturbating in a video arcade located in the rear of a bookstore is not expressive conduct which is entitled to First Amendment protection. The closing of the video

arcade in the rear of the bookstore and its relocation to the front of the premises does not constitute prior restraint on free speech. The bookstore itself was not closed down.

Secondly, O.R.C. Chapter 3767 was constitutionally applied to abate the nuisance described. The allegation of pretext involving the bringing of the nuisance complaint is not a complete defense to the action and does not obscure the fact that the existence of a nuisance was proven.

Lastly, the remedy fashioned by the trial court was narrowly drawn to abate the illegal sexual activity of Petitioners' business while not interfering with the right to continue selling sexually explicit books, magazines and videos.

Ohio law was constitutionally applied resulting in a balanced and constitutional remedy that abated the nuisance.

## ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

### I. CHAPTER 3767 OF THE OHIO REVISED CODE WAS CONSTITUTIONALLY APPLIED TO ABATE A NUISANCE IN WHICH A BOOKSTORE ENGAGED IN THE BUSINESS PRACTICE OF RENTING BOOTHS TO MEMBERS OF THE PUBLIC TO BE USED FOR MASTURBATION.

Petitioners acknowledge the issue of pretext referred to in passing by Justice O'Conner and in slightly more detail by Chief Justice Berger in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In that case there was no assertion that the closure of the bookstore was sought under a public health nuisance statute as a pretext for the suppression of First Amendments protected materials. *Id.* at 708.

Contrary to Petitioners' assertion, Chief Justice Berger and the plurality did not recognize pretext as a defense, rather they recognized pretext as an element of the defense of selective prosecution. *Id.* In the context of selective prosecution the issue of pretext makes more sense because it does not distinguish between a community which opposes sexually explicit material and one which does not in determining whether or not a community may avail itself of the abatement procedures pertaining to a public health nuisance. Petitioners maintain that it was unlawful for Respondent to proceed with an abatement action despite the existence of a recognized nuisance because, separate and apart from such action, criminal prosecution for pandering obscenity had been brought against employees and the store, outside expertise had been sought, and/or public comment had been

made politically in opposition to the sale of hard-core pornographic materials within the City of Mansfield.

Petitioners assert that those factors, even though they were unrelated to the merits of the nuisance action, precludes the municipality from bringing an abatement proceeding pursuant to O.R.C. Chapter 3767. Respondent respectfully suggests that the more reasoned view is that taken by the Trial Court, making sure that there is evidence to support that a nuisance exists and narrowly tailoring its remedy to abate the nuisance.

The trial court found, by clear and convincing evidence that masturbation was taking place in the video booths in the rear of the bookstore, based upon the results of undercover operations conducted by Mansfield Police including the physical evidence, i.e. the presence of seminal fluid on the walls and floor of the booths, along with soiled paper towels, tissues and a used condom. (App. A49-A50).

The trial court applied Ohio's nuisance statute and found that those portions of the business where masturbation was occurring constituted a nuisance under O.R.C. § 3767.01(1) as a place upon which lewdness is conducted and permitted. The court proceeded to abate that nuisance by closing only the video arcade portion of the bookstore. The bookstore itself remains open to this day and it continues to sell what are described as sexually explicit books, magazines and videos. No First Amendment rights were abridged here. Indeed, First Amendment rights are not even implicated. As Judge Gwin noted "It is well-settled that masturbation, fondling, fellatio, and solicitation of prostitution in an adult bookstore

'manifests absolutely no element of protected expression' " (App. A13). *citing, Arcara,* 478 U.S. at 705.

## II. PROOF OF PRETEXT IS NOT A COMPLETE DEFENSE TO AN ACTION INSTITUTED PURSUANT TO CHAPTER 3767 OF THE OHIO REVISED CODE. RATHER, IT IS AN ELEMENT OF THE DEFENSE OF SELECTIVE PROSECUTION, WHICH COULD NOT BE PROVEN BY PETITIONERS.

In *Arcara,* the Court did not recognize pretext as a complete defense to a nuisance complaint. Rather pretext is referred to as an element of the defense of selective prosecution. "Were respondents able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution. *See, Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L. Ed.2d 547 (1985); *Arcara.* Selective prosecution is the defense for which the appropriate remedy would be dismissal.

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometime referred to as 'intentional and purposeful

discrimination.' " *State v. Flynt*, 63 Ohio St. 2d 132, 134 (1980), *quoting, United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *See also, State v. Freeman*, 20 Ohio St. 3d 55 (1985).

The first part of the two-prong test announced in *Flynt* describes the pretext, that being the singling out of one defendant to the exclusion of others similarly situated. There is no evidence on the record which would suggest that others similarly situated have not generally been proceeded against. There is no evidence of other places within the City of Mansfield where public masturbation is occurring.

The Petitioners would have the court create a new defense entitled PRETEXT. The practical affect of Petitioners' assertion would require the courts to look beyond the actual merits of an action and attempt to determine whether or not the action is driven by some improper or misguided intent.

In this case, the trial court found that a nuisance existed, irrespective of any alleged, additional motivation to pursue this matter that Respondent might have had. "The mere existence of a potential discriminatory purpose is insufficient to show that such purpose motivates the selection of [Petitioners] for prosecution." *Freeman*, 20 Ohio St. 3d at 58 (1985). The Judge acted accordingly to abate the nuisance under state law.

Despite Petitioners' attempt to hide behind the First Amendment to somehow justify the clear fact that masturbation was occurring in the video arcade portion of the bookstore, they cannot escape the simple truth that the First Amendment cannot be used to justify "obviously

unlawful public sexual conduct." *Paris Adult Theater, Inc. v. Slaton*, 413 U.S. 49, 67 (1973). "First Amendment values may not be involved by merely linking the words 'sex' and 'books'." *Arcara*, 478 U.S. at 705.

## III. THE REMEDY FASHIONED BY THE TRIAL COURT AS MODIFIED BY THE APPELLATE COURT WAS NARROWLY TAILORED TO ABATE THE NUISANCE THAT WAS FOUND TO EXIST I.E., CUSTOMERS MASTURBATING IN THE VIDEO ARCADE PORTION OF VIDEO VISIONS.

The trial court did narrowly tailor its remedy to abate the nuisance even though it was not necessary. Judge DeWeese in his Temporary Injunction and Order stated:

> The U.S. Supreme Court has warned Courts to be vigilant against such pretextual use of nuisance statutes to violate First Amendment rights. *Arcara*, 478 U.S. 697, 707 (fn. 4) and 708.
>
> Whatever the city's ultimate goals, they do not affect the fact that a nuisance has been proven in this case. Furthermore, this court, in the exercise of its equitable jurisdiction to enjoin the nuisance, can tailor its order to abate only the nuisance which was demonstrated. It is not necessary to close the entire store to temporarily abate the nuisance nor to sweep too broadly against material not demonstrated to be outside First Amendment protection. (App. A52).

While Petitioners argue that the Court went too far in closing the video area because Video Visions was allegedly complying with the City's open-door Ordinance, the court reasoned as follows:

> Respondents' counsel asserts (although evidence was not presented) that the doors have been taken off the booths since this case was filed. Because of the other design attributes of the arcade, however, the court is not persuaded that removal of the doors will abate the nuisance. (App. A48).

Hence the Court did apply the fourth-prong of the test in *United States v. O'Brien*, 391 U.S. 367 (1968) fashioning the "least restrictive" means to abate the nuisance while safeguarding alleged First Amendment freedoms even though this Court has already found in *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St. 3d 354, 362 (1992), as did the Supreme Court in *Arcara*, 478 U.S. 697 that compliance with the fourth-prong of the *O'Brien* test was not required because *O'Brien* is not relevant "to a statute directed at imposing sanctions on non-expressive activity." *Arcara*, 478 U.S. at 707. Masturbation in public is unlawful conduct "having nothing to do with books or other expressive activity." *Id.*; *See also, State ex rel. Roszmann v. Lion's Den*, 89 Ohio App.3d 775 (1993).

As Judge Gwin pointed out, Video Visions was not ordered to close down its entire business. They continue to sell and rent sexually explicit books, videos and magazines. (App. A23-A24). They were not required to remove their video booths, rather they were permitted to set up a booth in the front portion of the store in view of the sales counter. (App. A11).

Judge Gwin held and Respondent asserts, that the remedy described was "the most effective means of abating the nuisance and has *little effect* on [Petitioners'] First

Amendment freedoms." *O'Brien, supra.* (App. A24). (Emphasis added).

## IV. CONCLUSION

For all the foregoing reasons, Respondent, Robert L. Konstam, respectfully requests this Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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